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JAMES H. MCKENNEY,

THE PENN MUTUAL LIFE INSURANCE COMPANY, JACOB H. TOME, ROBERT SOELET and GOUEN SOELET, Appellants,

versus

THE CITY OF AUSTIN; JOHN McDONALD, Mayor of the City of Austin; WILLIAM C. WALSH, FRANK HAMILTON, S. K. MORLEY, A. P. WOOLDRIDGE, JOHN W. HARRIS, M. A. TAYLOR and JOHN McDONALD, Composing the Board of Public Works of the City of Austin; and the AUSTIN WATER, LIGHT & POWER COMPANY, Appellees.

Appeal from the Circuit Court of the United States for the Western District of Texas.

BRIEF OF APPELLANTS.

SKIPWITH WILMER,
SAMUEL B. HUEY,
D. T. WATSON,
Solicitors for Appellants.

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Supreme Court of the United States,

OCTOBER TERM, 1895. No. 636.

THE PENN MUTUAL LIFE INSURANCE COMPANY, JACOB TOME, ROBERT GOELET AND OGDEN GOELET, APPELLANTS,

versus

THE CITY OF AUSTIN, JOHN McDONALD, MAYOR OF THE CITY OF AUSTIN; WILLIAM C. WALSH, FRANK HAMILTON, S. K. MORELEY, A. P. WOOLDRIDGE, JOHN W. MADDOX, M. A. TAYLOR AND JOHN McDONALD, COMPOSING THE BOARD OF PUBLIC WORKS OF THE CITY OF AUSTIN; AND THE AUSTIN WATER, LIGHT AND POWER COMPANY, APPELLEES.

Appeal from the Circuit Court of the United States for the Western District of Texas.

HISTORY OF THE CASE.

This is an appeal from a decree of the Circuit Court of the United States for the Western District of Texas, dismissing the plaintiffs' bill on a demurrer, filed by the city of Austin and its Mayor and Board of Public Works. The facts of the case, as gleaned from the bill, are as follows:

In 1882 the city of Austin, the capital of the State of Texas, had a population of 10,000, but no adequate water supply for either public or private use, for the extinguish-

ment of fires, nor had it the money, or the credit upon which it could borrow the money, required for the erection of the necessary works to secure such supply.

To erect adequate works of its own would have required such a rate of taxation as to practically exhaust the taxing power of the city, and so heavily burden the tax-payer that the ability of the city to carry on its ordinary government and other needed public improvements would have been seriously impaired. The best, if not the only, means then available to provide the city and inhabitants with a sufficient water supply was by securing the construction of such works by private enterprise. It was impossible to do this except with the assurance that the cost of the erection would be repaid with a reasonable return for the investment.

Both the city and its inhabitants realizing the situation, the City Water Company was induced to erect such works and supply the city and inhabitants with water.

The charter of the city of Austin, approved April 5th, 1873, provided that the Mayor and City Council should have the power

> "To construct water works and gas works, within or beyond the city limits, or both; to provide the city with water and gas, to erect hydrants, fire-plugs and pumps in the streets, * * * to provide for the prevention and extinguishment of fires and organizing fire companies."

By the general laws of Texas it was provided that:

> "The municipal authorities of any city, town or village in which any gas-light or water corporation shall exist, are hereby authorized to contract with any such corporation for the lighting and supplying with water the streets, alleys, lots, squares and public places in any such city, town or village."

The free incorporation of water companies for "the supply of water to the public" was authorized by general statute,

and when incorporated such companies were authorized as as follows (Article 629, Revised Statutes):

> "Any gas or water corporation shall have full power to manufacture and sell, and to furnish such quantities of water or gas as may be required by the city town or village where located for public or private buildings, or for other purposes, and such corporation shall have power to lay pipes, mains and conductors for conducting gas or water through the streets, alleys, lanes and squares in such city, town or village, with the consent of the municipal authorities thereof, and under such regulations as they may prescribe."

With these laws in force, the Mayor and City Council of Austin, upon the petition of a large number of citizens and tax-payers, passed an ordinance, approved April 13th, 1882, consenting to the City Water Company, a corporation of the State, laying its pipes in the streets, and supplying the city with water at a fixed rate (R., p. 41), and instructing the Mayor to contract with the water company to supply water for use in the streets and public hydrants and fountains, and for the extinguishment of fires by the Holly system of pumps. Part of the water so to be furnished to the city was to be paid for by a fixed hydrant rental, and part was to be furnished as an equivalent for the municipal taxes on the water company's property. The water company was to extend its mains whenever and wherever directed by the city authorities.

This ordinance recited in the preamble that it was passed:

> "In accordance with the powers granted in the charter of the city, and for the purpose of more effectually protecting the city from fire, and to secure the citizens with a supply of water suitable for domestic purposes, and for other benefits to the city."

To meet the interest on any bonds which might be issued by the water company it was provided that so much of the

city's water rental for hydrants as might be required for the purpose should be paid by ths city to the bondholder through their trustee. (See contract at length—Record, pages 37–46). We quote the provision:

> "Section 14. It is hereby agreed by and between the City Water Company and the city of Austin that so much of the hydrant rental to be paid by the city of Austin under the provisions of this contract, as will fully pay the interest on all outstanding bonds of the City Water Company, and all bonds that hereafter may be issued by the said City Water Company, shall be paid to the holders of such bonds, through their trustee, at the time specified in this contract for the payment of such hydrant rental to said company, so long and until all such bonds are fully paid and cancelled, and the balance of the hydrant rental due from the city shall be paid to the said City Water Company. It being understood that the hydrant rental which the city of Austin agrees to pay to the said company for fire protection, or so much of said amount as shall be necessary to pay the interest on such bonds, shall be set aside and paid to the trustee of such bonds, and by him used exclusively and only for the payment of interest upon such bonds when and so long as the same shall become due and payable, but in no event shall the city of Austin pay to said trustee, for such interest, a sum greater than the amount agreed to be paid to the City Water Company."

The consent was granted and the contract was made to run for twenty years, the city reserving the right to purchase, after the expiration of ten years, the entire property of the water company at its appraised value, exclusive of franchise, paying as part of the purchase price any bonds which the company might have issued upon the security of its works.

The city of Austin and its taxpayers knew the City Water Company was not able of itself to furnish means to erect such works, and it was intended by the water company that the money should be obtained by the issuing of bonds,

secured by mortgage, on the water company's property. This plan of raising the money was well known to and approved of by the city of Austin and its taxpayers, and, in order to further it and render the bonds salable, the city inserted in the contract that the hydrant rentals should be applied to payment of interest on the bonds, and if the city purchased the works the purchase money, so far as necessary, was to be applied to payment of the bonds.

When the mortgaged bonds were offered for sale the City Water Company, with the full knowledge and approval of the city of Austin, and, in order to induce purchasers to buy the bonds, stated that the water works were to be erected at the request of and for the benefit of the city of Austin; that the sum to be paid for hydrant rentals was to be applied to the payment of interest on the bonds, and that the proceeds of bonds was to be applied solely to the cost of construction of said water works; that the contract was for twenty years, with the right to the city to purchase the works, and, if so, the purchase money was to be used to pay the bonds.

The plaintiffs each purchased the bonds, relying upon the truth of these representations and believing that the bonds were amply secured by the contract and the appropriation of the moneys under the contract, taken in connection with the value of the water works on which a mortgage to secure the bonds was given.

Under the provisions of this contract and license, the water company proceeded to erect extensive works, to lay mains and pipes and to build powerful fire pumps for the extinguishment of fires. As its work progressed, it issued several series of bonds. An electric light company was also established, and the city granted to it the right to erect poles and maintain a system of electric lights, and a small number of bonds were issued by the company.

The works of the water company were completed on March 6th, 1883, on which day the City Council and the Mayor certified, Record page 48, that the company had

> "Fulfilled and complied with each and all of the provisions of said contract to the entire satisfaction of the Mayor and City Council,"

and that the water rent payable by the city should commence from that date.

On the 28th of June, 1887, all the property of the City Water Company, including its rights, franchises and rentals under the city contract, and all the property of the electric light company, were granted and conveyed to the Austin Water, Light & Power Company,

> "a corporation duly incorporated under the laws of Texas, for the purpose of providing water and electric light and power to the city of Austin,"

and certain bonds were issued by this company.

This new company at once assumed all the contracts with the city, which recognized it as the successor of the original company, and called on it to fulfill the contracts and extend the mains and erect hydrants, as the public convenience required, and has paid to it, or for its benefit, the water rentals as provided. The water company has complied with all the requirements of the city stipulated for in the contract, although it has thus been compelled to extend its mains on many of the streets before there was any adequate custom therefrom to pay for it, and there has been invested in the water and electric plant a sum of about $1,100,000.

There appears to have been no interruption in the contractual relations of the city and the water company from March 6th, 1883, when the Mayor accepted the works and began to pay the water rents, till March 30th, 1890, when the city took the first step looking to a violation of its contract. On this day it passed an ordinance providing for the

issue of $1,400,000.00 of bonds, with which to build its own water works.

On July 31st, 1890, the Mayor and City Council directed these bonds to be sold, and the proceeds applied to the erection of such works. (*R.*, p. 66.)

On April 3rd, 1891, the Legislature of Texas passed an Act granting a new charter to the city of Austin, and authorizing it to build and operate a water and electric light system to supply the city and its inhabitants, and for this purpose to take and acquire such property as may be necessary.

This Act became a law without the approval of the Governor. (R., p. 101.)

The appellants are the owners of the bonds issued by the City Water Company, and, also, by the Austin Water, Light and Power Company as follows:

The Penn Mutual Life Insurance Company of $100,000.00, face value, of the first mortgage bonds issued by the City Water Company; Jacob Tome of $10,000.00, face value, of the second mortgage bonds of the City Water Company; Ogden and Robert Goelet of $50,000.00, face value, of the mortgage bonds issued by the Austin Water, Light and Power Company.

The total issues were as follows:

City Water Company, 1st, $250,000.00.

City Water Company, 2nd, $100,000.00.

Austin Water, Light and Power Company, $750,000.00.

The defendants in error are the Austin Water, Light and Power Company, the city of Austin, the Mayor and the members of the Board of Public Works of that city.

The bondholders show in their bill that the water works had been erected from the money derived from the sale of these bonds, and at the request of and was accepted by the city authorities; that the city had agreed to take water from

the company for public uses for twenty years, and to apply the rental to the payment of the interest on these bonds, and if it should purchase the works, to apply the purchase money to the payment of the principal of the bonds. The city knew that the water company had expended and was continuing to expend a large amount of money by direction of the city in extending the works, and that it was mainly in reliance upon its contract with the water company that these bonds were purchased by plaintiffs.

The City Water Company's works were and are ample to supply the city of Austin and its inhabitants with water. The water supplied is unquestionable in quality and quantity.

The City Water Company and its successor have fully complied with and kept, in all its parts, the contract made with the city of Austin.

The water works to be erected by the City of Austin will not be superior to that of the City Water Company, and will not supply more or better water.

There is no necessity for new water works. The City Water Company's plant does and can fully and amply supply all of the wants of the City of Austin and its inhabitants. If two water works are built the one owned by the city will render worthless that owned by the City Water Company, will destroy the value of the plant pledged to the bondholder to secure the payment of his bonds, and cause irreparable loss and injury to the bondholder.

That the City of Austin, in erecting the new works and proclaiming the intent of the city to wholly repudiate the City Water Company's contract, intends to depreciate and destroy the value of the property of the water company. That the city does not expect by the new works to get a better fire protection, or better water, or a better supply of water. That the bondholders have remonstrated with the city against

its proposed action, but the city has openly repudiated the contract, and has actually begun the erection of new water works, throwing a dam across the river, and contracting for pipes, etc.

> "And it is the declared and avowed intention of the said city to press the construction of said rival system of water works to a speedy completion, and upon completion of the same to discontinue the taking of water from the said water company, and to refuse to perform any of the obligations resting upon the said city as embraced in the said contract with the said City Water Co."

That this was no idle threat is seen by the demurrer in this cause, where the city wholly repudiates the water company's contract.

The result of this action of the city will be to render worthless the property of the City Water Company upon which the mortgage was given, to take away the fund, *i. e.*, hydrant rentals, which the city provided for the payment of interest on the bonds, and in this way take from the bondholder the very security and fund provided for the payment of the interest and principal of his bonds.

Not only this, but to enable the city to raise means to build its new water works, it taxes, contrary to its contract, the property of the City Water Company, and thus makes the City Water Company contribute to its own destruction.

The plaintiffs assert that they and other bondholders of the company have repeatedly applied to the Austin Water, Light & Power Company and its officers, urging them to institute proceedings for the protection of their property against this action on the part of the city, which was destroying the value of the property and the security pledged to the bondholders, but that the officers of the water company, fearing to provoke the further hostility of the city authorities, have refused and failed to take any action for their protection.

The contract was with the City Water Company. Although referred to in the contract, the trustee under the mortgage was not a party to it any more than were the bondholders, who are also mentioned. It is doubtful if any action at law on the contract could be maintained in the name of the trustee. This proceeding, however, is not for the purpose of directly enforcing either the contract or the mortgage. The bondholders, who are the parties substantially interested, whose rights alone are invaded, and whose rights are purely equitable, appeal to a court of equity to protect them from an inequitable and unconscionable attempt to evade the contract and destroy their security, an attempt so indirect that no action at law and no act of their trustee could afford them either protection or remedy.

The bill for injunction and general relief was filed January 3d, 1895, in the Circuit Court of the United States for the Western District of Texas, the plaintiffs all being non-residents of that State.

After stating the facts, it distinctly alleged that the action of the city of Austin was such as to impair and destroy the binding force and obligation of the contract entered into by the City Water Company with the said city, and, therefore, in violation of the provisions and inhibitions of the Federal Constitution. (Paragraph 30.)

Paragraph 33 asserted that the effect of the legislation of the State of Texas in 1891 was to impair the binding force and obligation of the contract between the city of Austin and the City Water Company, and was, therefore, also, in violation of the provisions and inhibitions of the Constitution of the United States.

It asks a decree adjudging that the ordinance and contract accepted and acted upon by all parties are in full force and effect; that the contract is a valid and subsisting one upon

the city as well as upon the water company and the bondholders; that the city must abide by and perform the same; that until its purchase of the existing water works in the manner set forth in the contract, the city of Austin, its Mayor and City Council, have no right to construct rival water works or interfere with the rights of the Austin Water, Light & Power Company; that it is unlawful and inequitable for the city of Austin to levy and collect the tax on the property of this company, and that the city and its officers be enjoined from taking a supply of water for city purposes from any other source, and from proceeding to construct and maintain a new system of water works, and from taking and appropriating, except in the manner provided in said contract, or from interfering with the operation of, the existing works, so constructed at its instance and for its benefit, with money furnished by the bondholders upon the faith of its obligations.

It thus appears:

1. That the water company had granted to it certain privileges, such as laying its pipes in the streets, etc., of the city, and of furnishing water to the city and its citizens, in consideration for which it undertook to erect the needed water works, and to furnish a water supply to the city.

2. The bondholders furnished to the water company the money with which the works were built, the city, on its part, agreeing to pay the interest on the bonds to the extent of the water rental, and the principal in case it should determine to buy the works.

3. The city further agreed that the water which it stipulated should be furnished free of charge should be accepted as payment of taxes on the water company's property.

4. That all of the undertakings on the part of the water company have been fully and faithfully performed. It has

laid mains and pipes wherever the city authorities directed; has supplied new and additional engines and pumps; has furnished water for the extinguishment of fires, and the bondholders have supplied the money for this work on the faith of the city's contract.

5. The city has not only repudiated its contract, but has itself engaged in the business of building new works at the public expense, and by levying taxes on the water company's property for this purpose compels it to contribute the means for its own destruction.

6. The water company, though appealed to by the bondholders, fearing to antagonize the city, passively submits. The bondholders, who are non-residents, appealed to the Federal Court for relief. To render our brief direct and simple, we treat the case as if the City Water Company was still in existence. That it sold out to the Water, Light and Power Company, and that this latter company proceeded to carry out the contract with the consent of the city of Austin, is not denied.

In our judgment this case primarily raises questions under the Federal Constitution, which may be stated as follows:

(1.) In 1882 the city of Austin, a municipal sub-division of the State of Texas, was given by the State of Texas power

"to construct water works," and
"to provide the city with water,"

and, also,

> "the municipal authorities of any city * * * in which any * * * water corporation shall exist are hereby authorized to contract with any such corporation for the * * * supplying of water to streets, alleys, lots, squares and public places in any such city, town or village."

In 1882 the city of Austin made a contract, running twenty years, with the City Water Company to supply Austin and its inhabitants with water, and assented to that company's using its streets.

(2.) The City of Austin was expressly authorized to contract with the City Water Company to supply Austin and its inhabitants with water. In so far as such a contract necessarily, and from the nature of the case, implied an exclusive use as against the city it was expressly authorized by legislation. Except as thus authorized, the City of Austin did not give any exclusive right to the City Water Company.

The contract that was made did not create a monopoly, or one which is prohibited by the constitution or laws of Texas.

It did not pretend to interfere with the accustomed right or privilege of the citizen to sell water, and so far as this case is concerned, it only excluded the city itself from furnishing a double supply.

(3.) The city of Austin was bound to perform its contract in substance and in good faith, and it could not, by its own act, change the *status quo* of the contract so as to deprive the other party of gains which it would have received if the *status quo* had been maintained, nor could it thus take from the bondholder the fund provided for the payment of the interest on his bonds, nor depreciate and lessen, if not utterly destroy, the property pledged to the bondholder for the payment of the principal of said bonds.

The city of Austin did, in supposed compliance with legislative authority, and by the various ordinances of March 31, 1890, the election of May 5, 1890, the ordinance of April 1, 1890, the ordinance of May 5 and May 6, 1890, the ordinance of July 21, 1890, and the ordinance of October 6, 1890, all passed under supposed legislative authority, violate its contract with the City Water Company, in that it proceeded to change the *status quo* of the contract, and to provide for the erection of a rival water works, which would totally destroy the value of the City Water Company; and followed this up by an issue of bonds and the construction of water works, and a declared intent to the effect that, when the new water works was ready to furnish water, the city would refuse any longer to comply with its contract with the City Water Company.

Such ordinances and such action are in violation of that section of the Constitution of the United States, prohibiting any State from passing a law impairing the obligation of a contract.

(4)—During the construction of the new works the State gave a new city charter, in which express power is given to the city of Austin to erect, construct, build and operate a water system for supplying the city and its inhabitants with water, and after this charter was passed, and in supposed compliance with the power thereby granted, as well as of the supposed power contained in the legislation which existed in 1882, the city of Austin, a municipal sub-division of the State, proceeded to construct a new water works, and openly repudiated all liability under the contract of the City Water Company, with the declared and avowed determination that it would press the construction of its said system of water works to a speedy completion, and when the same was com-

pleted discontinue the taking of water from the said water company, and refuse to perform any of the obligations of the said water company contract.

This Act of Assembly and the action of the city in pursuance thereof are in violation of that section of the Constitution of the United States prohibiting any State from passing a law impairing the obligations of a contract.

(5)—The city of Austin, in 1862, was authorized, as we have seen, to contract with any corporation for the supply of water. In supposed pursuance of that and other legislative power it made a contract with the City Water Company, and, among other things in that contract, the City Water Company agreed that the city should have the use of water free for hydrants for flushing gutters and sewers; also for the fire department buildings, city hall and offices; also for public schools, for fifteen (15) public watering places, for one (1) fountain in each park, and for the use of the city cemetery;

> "in consideration for all of which the property of the City Water Company shall be and the same is hereby exempted from municipal taxation during the full term for which this contract is executed."

Afterwards, and by the Ordinance of March 31st, 1890, the city imposed a tax of $1.11\frac{1}{2}$ on the $100.00 worth of property made taxable by the charter of the city of Austin, for the purpose of paying the interest and two (2) per cent. sinking fund annually on the said bonds, and the tax was to be known as the water works tax. The city, in the year 1893, contrary to its contract just cited, levied a tax upon the water company of $5,276.80, and, in the year 1894, of

more than $5,000.00, and proposes to continue levying that tax and appropriating the money so obtained to the payment of interest and raising a sinking fund for the bonds which were sold to build the rival water works.

This tax was laid, as the Ordinance shows, in supposed pursuance of legislative and constitutional power, and is, therefore, in conflict with Section 10, Article I, of the Constitution of the United States.

But if, for any reason, and contrary to our hope and belief, this court should decline to affirm the position just stated, and should hold that the action of the city of Austin was rather administrative in character than legislative, and that, therefore, the acts of the city, in repudiation of the contract made with the water company and the attending obligations of the same, were not *laws* of the State of Texas within the meaning of the federal constitution; still, as the Circuit Court had jurisdiction of the bill in this case, by reason of the citizenship of the parties, we ask this court, under its rulings in the case of Horner vs. The United States, 143 *U. S.*, 571, and kindred cases, to consider the following propositions:

See also—

Cornell vs. Green, 163 *U. S.*, 75.
Citizens Bank vs. Cannon 165, *U. S.*, 319.

First. In 1882, the city of Austin, a municipal sub-division of the State of Texas, was given by the State of Texas power "to construct water works," and, also, "to provide the city with water;" and, under the general legislation of the State, it was also provided that "the municipal authorities of any city * * in which any * * water corporation shall exist, are hereby authorized to contract with any such corporation for the * * supplying of water to streets,

alleys, lots, squares or public places in any such city, town or village." In 1882 the city of Austin, in pursuance of such expressed powers, made a contract, running twenty years, with the City Water Company, whereby the City Water Company was to supply the city of Austin and its inhabitants with water, and in which, by ordinance and contract, the city of Austin assented to the use of its streets by the City Water Company.

Second. That the city of Austin was expressly authorized to contract with the City Water Company to supply Austin and its inhabitants with water. In so far as such a contract, from its nature, necessarily implied an exclusive use as against the city's supplying water itself, or building competing works, the city of Austin was expressly authorized, by legislation, to make the same. Except as thus authorized, the city of Austin did not give any exclusive right to the City Water Company. The right that was given is not a monopoly, which is prohibited by the constitution or laws of the State of Texas.

Third. The city of Austin was bound to perform its contract with the City Water Company in substance and good faith, and it could not, by its own act, change the *status quo* of the contract so as to deprive the City Water Company of gains which said water company would have received if the *status quo* has been maintained; and, as the bonds were sold under the circumstances hereinbefore narrated, on the faith of the validity of the contract and the security of the property of the company, the city of Austin could not violate such contract, nor do such acts as would render worthless the security which the bondholder received to insure the payment of the bond.

Fourth. The city of Austin, in holding an election to issue $1,400,000.00 worth of bonds, in passing ordinances authorizing the issuance of the same, in levying the tax to pay the interest and provide a sinking fund for the payment of the bonds, in its avowed intention to erect rival water works of its own, and declaring its intent to wholly repudiate the contract with the City Water Company—was acting in direct contravention of its duty, and it was not carrying out its contract with the city of Austin in good faith, and it was attempting, by its own acts, to change the *status quo* of the contract so as to deprive the City Water Company of the gains and profits it otherwise would have received, and to take from the bondholder the security which he had for the payment of the interest and principal of his bond.

Fifth. The city, by such contract, agreed to rent from the City Water Company a number of hydrants at a fixed price per annum, and stipulated that all of such money, so far as necessary, should be paid to the holders of the bonds to be issued by the City Water Company so long and until all such bonds were fully paid and cancelled, and that the money should be exclusively used for such bonds. On the faith of its promise that the city would carry out the contract the plaintiff purchased said bonds. The city must rent the hydrants and pay for them the price agreed even if a part of the contract, *i. e.*, that granting supposed exclusive privilege, was void. The same result follows as to the duration of the contract. Even if twenty (20) years was too long for a reasonable time the contract will be binding.

Sixth. The provisions of section 11 of the contract were, in consideration that the water company would furnish to the city, for certain purposes, water free of charge, the property of the City Water Company is exempted from municipal tax-

ation during the term that the contract is valid and binding upon the city of Austin, and it cannot lawfully tax the property of the City Water Company to raise funds to enable it, the city, to build competing water works which will render worthless the plant of the City Water Company.

Seventh. Under the facts stated in the bill, and admitted by the demurrer, the bonds were sold on the faith of the validity of the contract, and the promise by the city of Austin that it would carry it out in good faith. As the city of Austin knew and consented to the sale of the bonds under such statements, it is estopped to deny the validity of the contract, at least in so far as the bondholders are concerned, and should be enjoined from violating the said contract or rendering worthless the security of the bonds.

Eighth. Whichever view be ultimately taken, *i. e.*, that the contract and ordinance were in their nature legislative, or that the same were administrative, yet the plaintiffs could not have an adequate remedy at law.

The only adequate relief was a decree declaring the contract valid and binding, and enjoining the City of Austin from the doing of that which would destroy the same. The multiplicity and diversity of the interests, the variety of the questions raised, and the object to be obtained, all show that no adequate relief could be had at law.

POINTS OF LAW.

That we may present, in as direct a way as we can, the views in favor of the foregoing points this portion of the brief is directed to what we have called the affirmative view of our case. In a subsequent portion of it we consider the particular reasons given in the demurrer why the bill should be dismissed.

Affirmative View.

(I.) That a contract was made between the city of Austin and the City Water Company is unquestioned.

All the terms of it are set out and then comes this clause:

> "Now, therefore, these presents witness, that the said party of the first part, for and in consideration of the rights, privileges and agreements herein specified, hereby covenants and agrees to and with the said party of the second part, by its President, M. D. Mather, that it will faithfully keep and abide by the provisions of this contract, and will faithfully and fully discharge, perform, fulfill and carry out all the duties, obligations, powers and all other matters and things by it in said contract provided to be done and performed; and the said party of the second part, on its part, hereby covenants and agrees to and with the said party of the first part that it will faithfully keep and abide by the provisions of this contract, and shall and will faithfully and fully discharge and perform, fulfill and carry out the matters and things of every kind whatsoever by it in said contract provided to be done and performed." (Printed record, page 43.)

Attention is called to a decision of the Circuit Court of Appeals for the Eighth Circuit, opinion by Brewer, J., in National Water Co. vs. Kansas City, 62 *Federal Reptr.*, 853, where a contract very similar to the present was sustained.

(II.) What was it that under the contract the city of Austin granted or promised to do?

Turning to it, we see that it consists of two parts:

(*a*) The privilege granted to the water company.

We quote from the contract:

> "Whereas the City Council of the city of Austin deem it necessary to provide for a more effective protection of the property of tax payers of the said city from fire; and for the further purpose of extending such protection to a larger number of taxpayers, and also to secure the citizens of the said city a supply of water suitable for domestic purposes, and for the further benefits to the city of Austin, hereinafter mentioned, and, in accordance with the seventh and twentieth sections, or paragraphs, of article six (6) of the charter of the city of Austin, together with the other powers contained in said article six (6).
>
> "Therefore, be it ordained by the City Councils of the city of Austin:—
>
> "Section 1. That there is hereby given and granted to the City Water Company the right and privilege for the term of twenty years from the date of the execution of this contract, of supplying the city of Austin and the citizens thereof with water by a system of water works constructed upon the method of supplying a city with water, either for domestic use or for the extinguishment of fire, that is to say: by pumping the water directly into the mains with contrivances by which the pressure on those mains may be increased or diminished, or preserved uniform.
>
> "Sec. 2. The said company is hereby authorized to establish, construct, maintain and operate said

works in said city of Austin; to receive, take and store, construct and distribute water through the city; to construct and extend aqueducts, mains and pipes through all the streets, alleys, lanes and public grounds, across any streams or bridges in said city; to erect and maintain all engines, machinery and other appliances necessary for the proper construction of said works, and for supplying said city and the inhabitants thereof with water for domestic, manufacturing, fire and other purposes.

"The said City Water Company shall have the right to take up all pavements or sidewalks on streets, alleys, lanes or public grounds, and make such excavation therein as may be necessary to lay, repair and maintain aqueducts and pipes below the surface of the ground for conveying and distributing said water as aforesaid, etc."

Printed Record, pages 37, 38.

In brief, those privileges are:

(1.) Supplying the city of Austin and the citizens thereof with water by a system of water works.

(2.) To construct, maintain and operate said works; to receive, store and distribute water through the city; to construct pipes and mains through all the streets of Austin and over bridges; take up pavements and sidewalks for laying pipes to distribute the water.

(b.) The promises the city made as to the future.

(1.) The city agreed to pay an annual rental of $100.00 for each of one hundred hydrants on the main system of the water works.

(2.) The city further agreed to pay a rental of $50.00 per year for other hydrants connected with the extension of the water system.

All of this hydrant rental was to go to the bondholders, the contract providing:

> "Sec. 14. It is hereby agreed by and between the Clty Water Company and the city of Austin that so much of the hydrant rentals to be paid by the city of Austin under the provisions of this contract as will fully pay the interest on all outstanding bonds of the City Water Company, and all bonds that may hereafter be issued by the said City Water Company shall be paid to the holders of such bonds through their trustee at the time specified in this contract for the payment of such hydrant rental to said company, so long and until all such bonds are fully paid and canceled, and the balance of the hydrant rental due from the city shall be paid to the said City Water Company. It being understood that the hydrant rental which the city of Austin agrees to pay to the said company for fire protection, or so much of said amount as shall be necessary to pay the interest on such bonds, shall be set aside and paid to the trustee of such bonds, and by him used exclusively and only for the payment of interest upon such bonds when and so long as the same shall become due and payable, but in no event shall the city of Austin pay to said trustee, for such interest, a sum greater than the amount agreed to be paid to the City Water Company."
>
> *Printed Record*, pages 42, 43.

> "Sec. 11.—The city shall have the right to use the water free of charge from the hydrants for the purpose of flushing gutters and sewers, whenever the council shall deem it necessary for sanitary purposes, upon giving notice to the persons in charge of said water works; the city shall also have water free of charge for the fire department buildings, city hall, and offices occupied for city purposes, for all public schools of the city, for fifteen public watering places, for man and beast, and also for one fountain in each park and public ground, the jets of which shall not exceed in volume one-sixteenth ($\frac{1}{16}$) of an inch orifice, and not to run to exceed six hours a day for eight months in the year, and shall also have water free of charge for the uses and purposes of the city cemetery, in consideration for all of which, the

property of the City Water Company shall be, and the same is hereby exempted from muncipal taxation during the full term for which this contract is executed."

Printed Record, page 41.

The duration of the contract was twenty years, with the option to the city to purchase after ten years upon a valuation to be fixed by arbitrators.

(c.) WHAT WAS IT, UNDER THE CONTRACT, THAT THE CITY WATER COMPANY AGREED TO DO?

It agreed, on its part, to erect a system of water works defined under the contract with considerable particularity, to which we may briefly refer as follows:

"Section 4. The said water works shall be constructed with pumps of not less capacity than three million gallons in twenty-four hours, and also to produce the fire streams hereinafter mentioned, the pumps shall be what is known as the quadruplex compound condensing pumping engines of the Holly Company, and there shall be in addition an auxiliary, or reserve high pressure pump of the same capacity, making an aggregate easy working capacity of five million gallons per day.

"Section 5. The said City Water Company shall lay six miles of mains and pipes, more or less, as shown on the plat which makes a part of this contract, and is marked Exhibit "A," for the distribution of water in the said city, in addition to the mains and pipes already in use. The mains and pipes used in this extension shall be of proper sizes, and the said City Water Company shall replace such of its mains now in use with such other mains and pipes as to secure, in connection with the extensions herein mentioned, an easy flow of water through the entire system of mains, and to comply with all the conditions of this contract; said mains shall be from four inches to sixteen inches in their inner diameter,

and shall be of a standard weight and strength to insure the fire streams hereinafter mentioned.

"Section 7. For all extensions of mains which the city may hereafter order, in addition to the extension contemplated in this contract, the said company shall erect not less than ten (10) fire hydrants to the mile, for which the city shall pay a rental of fifty dollars a year for each hydrant so ordered and erected, payments to be made as hereinbefore mentioned.

"Section 9. Said water works when constructed shall have the capacity of discharging six (6) fire streams at the same time, through one (1) inch nozzles, from any six (6) hydrants located upon pipes not less in size than four inches in their inner diameter, through fifty feet of two and one-half inch hose, to a height of one hundred (100) feet, or to maintain its equivalent in pressure at the nozzle of said hydrants, so long as it may be necessary for the extinguishment of any fires. There shall be always sufficient pressure for all domestic demands.

"Section 10. The City Water Company furthermore agrees to put new hydrants in the place of old ones so as to make the nozzle connections for hose uniform throughout the whole one hundred and twenty-five hydrants located and to be located on the mains and pipes, as shown on the plat accompanying this proposition."

(d.) THE CONTRACT GAVE THE CITY OF AUSTIN CONTROL IN VARIOUS WAYS OF THE WATER WORKS, AND CONCLUDED WITH THE RIGHT OF THE CITY TO PURCHASE.

Section 6 gave the right to the city to take up any of the hydrants on the mains or pipes, and relocate them upon the extensions designated in section 5, and to order 25 additional hydrants.

In section 8 the city of Austin was given the right to erect and connect 25 fire hydrants, free of charge, for the ex-

tinguishment of fire; and also the right to connect stand pipes to the mains of all extensions.

In section 11 the city had the right to use the water, free of charge, from the hydrants, for the purpose of flushing the gutters and sewers, for the fire department buildings, city hall, and office occupied for city purposes, for all public schools, for 15 public watering places, for one fountain in each park and public grounds, and for the uses and purposes of the city cemetery.

In section 13 the city of Austin was given the right to acquire by purchase, and become sole owner of the water plant,

> "including all the grounds, machinery, mains, pipes, buildings and property thereto appertaining, at the expiration of ten (10) years, or at any time thereafter."

The valuation was to be fixed by appraisers, and was to exclude the value of the franchise.

(III.) *When the city made the contract did it exercise its governmental or legislative powers, delegated by the State to it, or did it merely act in its administrative capacity?*

Whether a city, providing for a gas or water supply, acts in pursuance of its governmental powers, or rather as a private corporation and under its administrative powers, is one upon which authorities differ.

That it acts merely as a private corporation is held in City of Petersburg vs. Applegarth, 28 *Grattan*, 221; Western Savings Fund Society vs. City of Philadelphia, 31 *Penna. St.*, 182; Long Island Water Supply Co., 38 *Northeastern Reptr.*, 807.

To the contrary, see :

Springfield Ins. Co. vs. Keeseville, 148 *N. Y.*, 46.
Garrison vs. City of Chicago, 7 *Biss*, 486.

See, also :

New Orleans Water Works Co. vs. Rivers, 115 *U. S.*, 674, 680, 681.

For a general discussion of the question, and when a city acts in its public and when in its private capacity :

1 *Dillon Munic. Corp.*, sections 66, 67, 775.

In the City of Valparaiso vs. Gardner, 97 *Indiana*, 1, the Supreme Court of Indiana said :

> "The important and controlling question which confronts us here is as to the power of the municipal corporation to enter in the contract described in the pleading. We have no doubt that the corporation had authority to contract for a supply of water for a period of twenty years, and that the contract cannot be overthrown solely on the ground that it is a surrender of legislative power. There is a distinction between powers of a legislative character and powers of a business nature. The power to execute a contract for goods, for house, for gas, for water, and the like, is neither a judicial nor a legislative power, but is purely business power. The question is, however, so firmly settled by authority that we deem it unnecessary to further discuss it. City of Indianapolis vs. Indianapolis, etc., Co., 66 *Ind.*, 396; *Dillon Munic. Corp.* (3d ed.), sections 473, 474, authorities N."

It may be that the correct answer is that the contract at bar involves both the governmental, or public, and administrative, or private, powers.

In so far as it is the grant of a privilege (*i. e.*, as to the use of streets) over which the city has control, it is possibly legislative, though even here it is not to be overlooked that the use of the streets was granted by the State to the City Water

Company, and the only control the city had was a power of dissent, and, also, the power of regulation.

See section 629 and section 630, *Revised Statutes of Texas*, which read:

> "Article 629. Any gas or water corporation shall have full power to manufacture and sell and to furnish such quantities of water or gas as may be required by the city, town or village where located, for public or private buildings, or for other purposes, and such corporation shall have power to lay pipes, mains and conductors for conducting gas or water through the streets, alleys, lanes and squares in such city, town or village, with the consent of the municipal authorities thereof, and under such regulations as they may prescribe.
>
> "Article 630. The municipal authorities of any city, town or village in which any gas light or water corporation shall exist, are hereby authorized to contract with any such corporation for the lighting or snpplying with water the streets, alleys, lots, squares and public places in any such city, town or village."

In so far as the contract was for the purchase of water from the water company, for which a certain sum was to be paid by the city, as hydrant rental, it was an ordinary business contract made by virtue of its administrative powers.

But whatever be the nature of the power exercised by the city—whether it be public or private—the contract with a corporation of the State, organized and expressly authorized by the State to furnish the city with water, and with which the city is expressly authorized to contract, is a lawful contract which can be enforced.

New Orleans vs. Clark, 95 *U. S.*, 644.

New Orleans Gas Co. vs. Louisiana Light Co., 115 *U. S.*, 659.

National Water Co. vs. Kansas City, 62 *Federal Reports*, 863.

(IV.) In reliance upon the grants and promises of the city of Austin the City Water Company agreed, as we have seen, to build its plant in a certain way and be subject to certain control by the city, and to furnish water at a certain rate to the city and its inhabitants.

The City Water Company carried out its contract and built its works as agreed. On March 8th, 1883, the City Councils and the Mayor certify that

> "the *City Water Company has constructed a system of water works and now has the same in successful operation, in accordance with the provisions of said contract*, and has fulfilled and complied with each and all of the provisions of said contract to the entire satisfaction of the Mayor and City Councils."
> *Printed Record*, page 48.

The money to do this had been raised by the sale of the water company's bonds.

(V.) The power given by the State of Texas to the city in the premises was to provide a supply of water to the city and inhabitants of Austin. It might do this by erecting its own works, or by contract, but it was only one supply it could provide. It could not spend the taxpayers' money

for a double supply. It exhausted its power by the single provision, and hence could not further use the means granted to provide the supply.

White vs. City of Meadville, 177 *Pa. St.*, 643.

Atlantic City Water Co. vs. Atlantic City, 39 *N. J. Eq.*, 367.

The city was authorized to see that a good and sufficient quantity of water was furnished to the city and its inhabitants. The legislature gave it power to do this in one of two ways:

By the city erecting a water works and directly supplying.

By the city providing for a supply by contract with some water corporation.

The city could do either.

It could not do both at the same time.

The thing to be furnished was an adequate supply of water.

The mode by which it would do this was optional with the city, within the scope of delegated power.

But if it saw fit by contract to provide an ample supply it could not, during such supply, and from its own mere whim, take the taxpayers' money and build a water works wholly useless and mischievous.

(VI.) By the very making of the contract the city, on its part, agreed that it would perform the same in good faith, and would not seek to defeat or prevent the performance of it by the water company; that it would not so change the *status quo* of the contract that the water company would be deprived of the gains and profits it

> otherwise would have reaped; that, having the power to buy the water plant at a fair valuation, it would not so act as to destroy its value, and that having agreed to pay a certain hydrant rental, which was to meet the bond interest, it would not so act as to hinder the water company from carrying out its contract.

When a city enters into a contract which is within the scope of its powers, it is bound in the same way and to the same extent as an individual or a private corporation would be, and this whether it contracts about a subject matter which is in its nature public or private.

In *Dillon on Municipal Corporations*, 4th ed., sec. 472, the law is thus stated:

> "But with respect to authorized contracts, a municipal corporation has the same rights and remedies, and is bound thereby, and may be sued thereon, in the same manner as individuals."

In *Beach on Public Corporations*, 1 ed., sec. 216, the doctrine is thus stated:

> "A municipal corporation is liable just as a private corporation or any person upon contracts properly assumed by the corporation."

The Supreme Court of Pennsylvania, in Dunlap vs. Erie Water Commissioners, 151 *Pa.*, 497, 481, said, in reference to the contracts of the city of Erie for the erection of its water works:

> "A corporation is like an individual in its capacity to contract, appoint agents and incur ordinary liabilities."

The Supreme Court of Indiana, in the case of the city of Indianapolis vs. The Consumers Gas Trust Company, 140 *Ind.*, 114, speaking of the contract of the city for gas, said:

"This contract being within the scope of the power invested in appellant, and not in violation of public policy, nor tainted with fraud, must be as binding and enforceable as that of a private corporation or person."

See also:

The Aurora Water Company vs. the City of Aurora, 129 *Mo.*, 540.

City of Indianapolis vs. Gas Light Company, 66 *Ind.*, 396, 407.

Height vs. Board of Commissioners, 68 *Ind.*, 575.

Water Works Company vs. City of Burlington, 43 *Kansas*, 725.

Grand Rapids vs. Hydraulic Co., 66 *Mich.*, 606.

City of New Orleans vs. The Wardens, 11 *La. Ann.*, 244.

Hitchcock vs. Galveston, 96 *U. S.*, 341, 350.

The People *Ex Rel.* The D. W. & Pgh. Ry. Co. vs. Batchelor, 53 *N. Y.*, 140.

The city was bound to carry out its contract in good faith. It could not, by its own act, render performance by the City Water Company impossible or more expensive or more hazzardous. It could not, by its own act, in effect, destroy the value of the plant built at its suggestion, to serve its purposes, nor could it lessen the value of the property of the water company, which is the security of the bondholder for the payment of his bond. Nor could it so act as to strike down the reasonable gains and profits which were to go to the City Water Company under the contract.

The decisions are believed to be practically unanimous in support of these doctrines.

In McIntyre vs. Belcher, 14 *C. B.*, (*N. S.*) 654, sale of medical practice to be paid for out of gross earnings of vendee —held, vendee bound to carry on practice.

In Inchbald vs. W. Neilgherry Coffee Co., 112 *Eng. Com. Law*, 739, Willis J., said:

> "One who enters into a contract is bound to perform his engagement in substance. This is illustrated by the case in B' strok, where the defendant contracted to deliver t he plaintiff a horse, but poisoned him before de ery. This was held to be not a substantial perfo. ance of the contract, because one of the contracting parties had done an act which prevented the other from having the benefit of it. I apprehend that whatever money is to be paid by one man to another upon a given event the party upon whom is cast the obligation to pay is liable to the party who is to receive the money if he does any act which prevents or makes it less probable that he should receive it."

In Stirling vs. Maitland, 5 *Best & Smith*, 814, an insurance company agreed to appoint B its agent, but the insurance company then sold out and wound up its bussiness—held, insurance company could not do so.

In Planthe vs. Calburn, 8th *Bing.*, 14, the defendants engaged plaintiff to write a treatise for periodical publication, but before finished defendant abandoned publication—held, plaintiff could recover for so doing.

Performance of a contract must be substantial and *bona fide* according to the true meaning of the parties, and not merely colorable.

Addison on Contracts, 1130.

Richardson vs. Barnes, 4 *Exchq.*, 128.

Wharton on Contracts, vol. 2, secs. 654, 671.

Where mine was leased, rent reserved being certain portion of coal mined. Held, plaintiff was bound to commence working immediately and proceed continuously.

Sharp vs. Wright, 28 *Beav.*, 150.
Jones vs. Shears, 7 *C. & P.*, 346.
Phillips vs. Jones, 9 *Sim.*, 519.

Where a debt is assigned the assignor can do nothing to prevent its collection.

Gerard vs. Lewis, 38 *L. J. C. P.*, 173.
15 *W. R.*, 581.
15 *L. T. N. S.*, 663.

A party may do nothing in derogation of his deed or covenant.

Aulton vs. Atkins, 18 *C. B.*, 249.

A sold to B certain personalty by deed, but afterwards he disposed of a bill of exchange, part of the personalty. He made no covenant to deliver it to B.

> "He did something in derogation of his deed when he parted with the possession of the bill of exchange in such manner, and upon such terms as to incapacitate himself, and thereby to prevent the plaintiffs from acquiring or having any right or title to the money therein specified."
> Parnell vs. Hingston, 2 *Jur.*, (N. S.), 854.

In Richardson vs. Barnes, 4 *Exchequer*, 129, an agreement to deliver up a lease was held to mean to deliver it in the condition it was when the agreement was made, and was not performed by delivering it with seal cancelled.

Where a stone quarry was leased at a rental to be determined by the quanity of stone quarried, held that the lessee was bound in good faith to work the quarry, and if he did not the plaintiff could recover on the basis of the quantity he could have mined if he had worked in good faith.

Watson vs. O'Herne, 6 *Watts*, 362, (*Penna. Rpts*).

The same rule is applied under like circumstances to a coal mine or an ore mine.

Lyon vs. Miller, 24 *Penna. St.*, 362.

Koch and Balliett's Appeal, 93 *Penna. St.*, 434.

(VII.) The city of Austin, in 1890, and subsequent years, contrary to the contract and to its duty and these obligations it took upon itself, did proceed to change the status of the contract, by providing for the construction of rival works for the purpose of supplying the city of Austin and its inhabitants with water.

It provided for and had an election of the taxpayers of Austin to authorize the issue of $1,400,000 of bonds for the express purpose of constructing new water works to supply the city; it held such an election and the vote was in favor of the bonds; it passed an ordinance for the issue and sale of the bonds; it proceeded to contract for the erection of a dam and the making of contracts for the supply of pipes, mains, etc., and at the same time it proclaimed its settled, fixed determination as soon as its own works were erected so as to obtain a supply from them, it would refuse any longer to comply with the contracts of 1882, and would no longer pay any hydrant rentals under the same.

It did all this without any pretense of necessity or any excuse whatever.

Unless the city is restrained from proceeding as it has begun the result will be to render worthless the water plant of the City Water Company, and to take from and deprive the bond-

holders of the security which the contract and the mortgage provided both for the principal and interest of the bonds.

(VIII.) The city did this by virtue of supposed legislative power vested in it by the Revised Statutes of Texas, and also by the Act of 1891 of the State of Texas, giving it express power to build the new works.

From which it follows:

(*a*) That the acts of the city and the legislative act of the State of 1891 are laws of the State of Texas within the meaning of that clause of the Federal Constitution which provides that—

No State shall pass any law impairing the obligation of contracts.

(*b*) But if this court should think that no question arises under the Federal Constitution, or that there are other material questions in the case in addition to the constitutional ones, then, as the Circuit Court of the United States had jurisdiction by reason of citizenship, we are at liberty to, and do insist in this court, that still the city should be restrained from its unlawful acts,

Because:

(1) They are in direct violation of its contract, which was duly authorized by the laws of the State of Texas.

(2) The city of Austin exhausted its powers when it, by contract with the City Water Company, provided for a supply of water, and, connecting the legislation of 1891 with that theretofore existing, the city of Austin had not the power, pending a sufficient supply by the water company, to erect its own works.

(3) The city is estopped to deny the validity of its contract of 1882, on the faith of which the bonds of the water company were sold.

(*a.*) Is There a Federal Question?

There can be no reasonable doubt that the acts and conduct of the City of Austin, in disregard of its contract with the City Water Company, flagrantly violate the contract, and therefore materially affect its value. This would *impair* the obligation of the contract.

Sturgis vs. Crowninshield, 4 *Wheaton*, 112.
Green vs. Biddle, 8 *Wheaton*, 84.
Louisiana vs. Pillsbury, 105 *U. S.*, 677.
Douglas vs. Pike Co., 101 *U. S.*, 677.
Cooley's Con. Lim., page 344 and note.
Planters Bank vs. Sharp, 6 *Howard*, 327.
2 *Hare's American Con. Law*, 679.

Can these acts of the city be said to be *laws* of the State of Texas?

If the Act of 1891 of Texas is to be read as conferring a direct and express power on the City of Austin to build the new water works, which would seem to be its meaning, *it certainly* is a law of the State of Texas, and it directly authorizes a municipal division of the State to disregard its contract obligations.

It therefore distinctly raises the Federal question. That act, and all acts of the city done under it, legislative in their nature, are virtually laws of the State.

But as the ordinance of the City of Austin which authorized the vote, and as the vote and the ordinance which authorized the bonds were (probably) all prior to the Act of 1891, are those ordinances and acts governmental or legislative in their character, or are they merely administrative and likened to the private acts of private business corporations?

Reviewing the authorities in the case of the New Orleans Water Works vs. the Louisiana Sugar Company, 125 *U. S.*, 30, this court, *inter alia*, insisting that the law which impairs the obligation of a contract must be the law of the State, said:

> "As later decisions have shown, it is not strictly and literally true that a law of the State in order to come within the constitutional prohibition must be either in the form of a statute enacted by the legislature in the general course of legislation, or in the form of a constitution established by the people of the State as their fundamental law."

In Williams vs. Bruffy, 96 *U. S.*, 176, 183, it was said by Mr. Justice Field in delivering judgment:

"Any enactment from whatever source originating to which the State gives the force of law is a statute of the State within the meaning of the clause cited relating to jurisdiction of this court. * * * So a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by a legislature to a corporation as a political subdivision of the State having all the force of a law within the limits of the municipality that it may properly be considered as a law within the meaning of this article of the constitution of the United States."

Hamilton Gas Light Company vs. Hamilton City, 146 *U. S.*, 266.

See also the following cases:

Walla Walla Water Company vs. Walla Walla, 60 *Fed. Rep.*, 957.

Baltimore Trust Company vs. Baltimore, 64 *Fed. Rep.*, 153.

Citizens Street Railway vs. Memphis, 53 *Fed. Rep.*, 715.

Saginaw Gas Company vs. Saginaw, 28 *Fed. Rep.*, 529.

Bacon vs. Texas, 163 *U. S.*, 207, 216.

New Orleans Water Works Company vs. New Orleans, 164 *U. S.*, 471.

Under what seems to be the view taken by this court in the case of the New Orleans Water Works Company vs. Rivers, 115 *U. S.*, 674, 680, 681, and, also, in the case of the New Orleans Gas Company vs. Louisiana Light Company, 115 *U. S.*, 650, 659, 660, that the right to supply a city with water or with gas is, at least in part, legislative and governmental in its nature, and not merely administrative, it would follow that the ordinances and votes of the councils and the citizens of the city of Austin to issue bonds to erect new water works

to supply the city of Austin with water, are legislative in their nature, and the exercise of legislative and governmental power, and, therefore, the law of the State of Texas within the meaning of the Federal Constitution.

This court has frequently held that a contract not to exercise the taxing power by a State as to a particular property is valid, and hence the question of the nature of this power the city uses is not believed to be material on this branch of the case.

Jefferson Branch S. Bank vs. Skelly, 1 *Black*, 436.
New Jersey vs. Wilson, 7 *Cranch*, 164.

(*b.*) In addition to the constitutional question, the Circuit Court had full jurisdiction of the case by reason of the citizenship of the parties, and this being so, the case was a plain one for the equitable relief prayed for in the bill on the following grounds:

(1.) That the acts and threatened acts of the city were contrary to the contract obligations of the city of Austin, and therefore the city should be restrained.

(2.) That the city had exausted its power in providing a water supply, and could not impose an additional burden of taxes for a second and useless supply.

(3.) Even if it were doubtful whether the contract was binding on the city, yet, as on the faith of its validity the bondholders bought their bonds, with the

assurance of the city of the validity of the contract, the city is now estopped to deny the same.

In so far as these positions raise questions of fact, it is not thought necessary to discuss them. The plain statements of the contract and the bill, in unmistakable language, show the grossest violation of good faith by the city of Austin, and an utter disregard of its contract obligations. If an individual or a private corporation were so acting, no one would doubt that relief should and would be granted. Unless this contract can be shown to be one the city of Austin had no power to make, which we consider *supra*, the same relief should be given against it as against a private individual.

This view of the case renders unimportant the question of whether the contract and the subsequent acts of erecting new works was the exercise of governmental powers by the city or merely administrative. Whether either, or both, the result is the same if the contract is valid.

It will also be noticed that this point involves the entire contract and all of its parts.

Suppose it could be held that in so far as this contract was exclusive it was unlawful, yet this does not strike down the entire contract, but still leaves the city bound by what are the valid parts of it, as for example the hydrant rentals.

Or, suppose it be said that twenty years was an undue and unlawful length of time for the contract, yet the city would be bound for such a length of time as was lawful and reasonable.

Columbus Water Company vs. City of Columbus, 48 *Kansas*, 99.

The discussion so far has assumed the validity of the contract between the City Water Company and the city of Austin.

But it is insisted that the contract is void, and the reasons given are, in brief, as follows:

(1.) That in and by the contract itself the city of Austin sought to give to the City Water Company the exclusive right to supply Austin and its people with water for 20 years, and as this was not authorized by legislation of the State it is *ultra vires* the city.

(2.) That if the State or the city did grant such privileges to the City Water Company it was the grant of

a monopoly which was contrary to the Constitution of the State.

(3.) That the Act of 1891, granted to the city of Austin the power to issue bonds for erecting new water works, and this legislation was valid notwithstanding the contract with the City Water Company, because of that clause of the Constitution of Texas, which provides:

> "and no irrevocable or uncontrollable grant of special privileges or immunities shall be made."

An examination of the contract, printed at length (pages 36 to 44, Record), will demonstrate—

(*a.*) That there are no provisions in its terms making it exclusive. The city of Austin did not covenant that only the City Water Company should have the right to supply Austin with water. Notwithstanding that coutract possibly the State of Texas might have created other corporations, and given to them or to individuals the power to supply water to Austin, without rendering the city of Austin liable as for a breach of contract.

The contract was exclusive only to the extent that the very nature of the subject matter made it so, and in so far as the city by making it exhausted its power, and in good faith was bound to carry out the contract.

It is true that the contract was for a supply of water; that we agreed to furnish this; that the city could only contract for one supply; that its duty was to get a supply. and to do this two powers were given it:

(1.) To itself erect water works and furnish the supply.
(2.) To contract with water corporations expressly created by the State to supply water to towns and cities.

When it procured the supply by the exercise of either power the other lay dormant. If it contracted for the supply it could not itself build works while the supply was being furnished under contract.

White vs. Borough of Meadville, 177 *Pa. St.*, 643.

So the same effect was produced by the duty of the city to carry out its part of the contract in good faith, and not do that which would defeat or render unprofitable its performance by the City Water Company; and as the building of new water works by the city would do this the city could not, pending the City Water Company contract and supply, build its own works.

To this extent, at least, the city of Austin was expressly authorized by the State of Texas to contract with the City Water Company.

Sections 565 to 570 of the Revised Statutes of Texas authorized the free incorporation of companies for

"the supply of water to the public,"

and then sections 629 and 630 of the Revised Statutes of Texas read that:

> "Article 629. Any gas or water corporation shall have full power to manufacture and sell and to furnish such quantities of water or gas as may be required by the city, town or village where located,

for public or private buildings, or for other purposes, and such corporation shall have power to lay pipes, mains and conductors for conducting gas or water through the streets, alleys, lanes and squares in such city, town or village, with the consent of the municipal authorities thereof, and under such regulations as they may prescribe.

"Article 630. The municipal authorities of any city, town or village in which any gas light or water corporation shall exist, are hereby authorized to contract with any such corporation for the lighting or supplying with water the streets, alleys, lots, squares and public places in any such city, town or village."

The municipal power in the premises, it will be noticed, is its control, in the first place, of the power of the corporation to lay pipes through the streets, and its authority to prescribe regulations for the corporation. Added to that it also has the power—

> "to contract with any such corporation for the supplying with water the streets, alleys, lots, squares and public places in any such city, town or village."

If it may contract, it may necessarily assume the invariable accompaniments and obligations of a contract, including the duty to act in good faith in carrying it out. It will be noticed that the thing it may contract for is a *supply*.

Here is the express statutory authority to make the contract; the express statutory power to establish regulations as to water companies, and the express statutory power to assent or dissent to a grant to the water company of the right to use the streets, and, therefore, to impose terms connected with the grant.

In the making of the contract, then, the city of Austin had express authority from the State, and therefore was not subject to animadversion on that grouud.

Indeed, in the case hereinafter considered of Brenham against the Water Company, 67 *Texas*, 558, on which the de-

murrants rely, the court admitted the power of the State to make *some* contract for the supply of water, but denied its right to make a contract for the period of twenty years.

This power given to the city to provide a water supply is not limited as to time. If water works were to be erected by the city, supply would be during the duration of these works. As a parallel power the city was authorized to provide by contract for a supply of water.

For what length of time might it make such a contract?

There is no limit in the authority conferred, and it must depend upon the discretion of the municipal authorities taking all the circumstances of the case into consideration.

To put it very mildly, where the contract is to build a new water works by the contracting party, in order to supply a city of over 10,000 inhabitants, and where a very large amount of money is to be invested in the plant, a term of ten years, with the right on the part of the city to take the works at any time after ten years, upon a valution to be fixed by appraisers, is certainly not unreasonable.

THE CONCLUSION THEN IS, THAT IN THE MAKING OF THE CONTRACT THE CITY OF AUSTIN HAD EXPRESS LEGISLATIVE AUTHORITY FOR SO DOING, AND THAT THE CONTRACT IS NOT ULTRA VIRES.

See city of Memphis vs. Memphis Water Co., 5 *Hershell*, 495;

Atlantic City Water Co. vs. Atlantic City, 48 *New Jersey*, 378.

Does the contract create a monopoly?

In the case of the Charles River Bridge vs. Warren Bridge, 11 Peters, 607, Judge Story defined a monopoly as follows;

"An exclusive right granted to a few for something which was before of common right. Thus, a privilege granted by the King for the sole buying, selling, making, working or using a thing whereby the subject in general is restrained from that liberty of manufacturing or trading which before he had, is a monopoly."

The case of Monopolies. 11 *Rep.*, 84.

Slaughter House Cases, 16 *Wall.*, 65.

The Crescent City Gas Light Co. vs. the New Orleans Gas Light Co., 27 *La. Ann.*, 138, 147.

New Orleans Gas Co. vs. La. Light Co., 115 *U. S.*, 658, 664.

Louisville Gas Co. vs. Citizens' Gas Co., 115 *U. S.*, 683.

New Orleans Water Works Co. vs. Rivers, 115 *U.* S., 674.

It never was of *common right* that the citizens of Texas had the power to lay pipes through the streets of the City of Austin and supply the City of Austin and its inhabitants with water. To do that required the use of the streets and highways running through the City of Austin, and which belonged to the State, and which no one could use for such a purpose without the consent of the State.

When the State created the City Water Company and gave it the power to do this, subject to the assent of the City of Austin, and with the right on the part of the City of Austin to contract with it for a water supply, the contract thus made was not the creation of a monopoly. It did not take from the citizens anything which was before of common right.

It was not, therefore, within the fair meaning of that clause of the constitution of Texas which provided that

"perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed."

Was this contract, in any fair sense, in conflict with that provision of the constitution of Texas which enacts that :

> "And no irrevocable or uncontrollable grant of special privileges or immunities shall be made, but all privileges and franchises granted by the legislature or created under its authority shall be subject to the control thereof."

This does not prohibit the granting of special privileges or immunities.

It merely enacts that the privileges or immunities granted shall not be irrevocable or uncontrollable. It gives to the Legislature the power to control such franchises and privileges as are granted by it.

See matter of Union Ferry Co., 98 *New York*, 139.

As we have seen, the Legislature granted to the City Water Company the privilege of using the streets and alleys of the city of Austin for its plant, subject to the regulations of and the assent of the city of Austin. This grant was neither uncontrollable nor irrevocable, and the State may, under constitutional authority, control the same.

When, however, the State authorized its municipal subdivision, the city of Austin, to contract for a water supply, the State did not reserve to itself, under this clause, the right either by itself or by the city of Austin to violate that contract. The Act of 1891, called the New Charter for the city of Austin, does not pretend to give to the city of Austin, in express terms, the power to violate the contract it made under the State authority with the city of Austin. It did authorize the city of Austin to construct new water works, but it did not authorize it so to do, if by its contract, and subject to the obligations of the same, the city of Austin could not lawfully do so. If such is the meaning of the Act of 1891, as we have seen, it is a law violating the contract and a law of the State of Texas.

(V.) The contract of the city of Austin with the City Water Co. was directly authorized by authority from the State. Section 630 of the Revised Statutes provided that:

> "The municipal authorities of any city, town or village in which any gas light or water corporation shall exist, are hereby authorized to contract with any such corporation for the lighting or supplying with water the streets, alleys, lots, squares and public places in any such city, town or village."

Our case is not governed by Brenham vs. City of Brenham, decided by the Supreme Court of Texas.

The case of Brenham vs. the Water Company, 67 *Texas*, 542, will be relied upon as conclusive of the proposition that the contract between the city of Austin and the City Water Company was *ultra vires* the power of the State, and therefore void, because:

(*a*) It was the grant of an exclusive privilege to the City Water Company without express legislative authority.

(*b*) That the contract created a monopoly of the City Water Company, and was, therefore, void.

The Brenham case was not decided until 1887.

The contract of the City Water Company with the city of Austin was made in 1882, and its works completed in March, 1883. Its bonds had been sold and purchased by part of the plaintiffs prior to the latter date, and the money used in the construction of the works. Its first issue of bonds bears date July 1st, 1882. Of these the Penn Mutual Life Insurance Company bought $100,000 face value for $102,000.

In the case at bar, therefore, as the decision of the Supreme Court of Texas was made years after the contract of the city of Austin with the City Water Company, and years after the purchase of bonds issued by the City Water Company on the faith of the validity of that contract, said decision in the case of Brenham vs. Brenham Water Company, 67 *Texas*, is not conclusive upon this court, except in so far as its reason meets with its approval.

Carroll County vs. Smith, 111 *U. S.*, 562, 563.

East Alabama Railway Co. vs. Doe, 114 *U. S.*, 353.

See, also—

Wilmington & Weldon R. Rd. vs. Alsbrook, 146 *U. S.*, 279-293.

Mobile & Ohio R. Rd. vs. Tennessee, 153 *U. S.*, 486-492.

If this court is persuaded that, on a fair construction of the contract in suit and of the Revised Statutes and Constitution of the State of Texas, the city of Austin had the power in 1882 to make this contract, and that the same was not the creation of a monopoly within any well known definition of that term, then it is submitted that the contract should be held binding, notwithstanding the decision of the Supreme Court of Texas in the Brenham case.

The decision of the Supreme Court of Texas in the city of Austin vs. Nalle, 85 *Texas*, 520, touches only indirectly upon any of the questions in the case at bar.

It was asserted in the brief for the appellant in that case, (page 527), that as the city had an ample water supply by

contract it had exhausted its power. To which the counsel for the defendants replied that it was immaterial to the points under discussion, and that, if material, the facts were not before the court. The only reference to it which the court made is on page 549, and is as follows:

> "It is further alleged, that at the time of the passage of the ordinances for the election and the issue of bonds, the city had a contract with a certain company, by which it was provided with an adequate supply of light and water, and that that company was still able and willing to carry out its contract, and to supply all the light and water which the necessities of the city required; and it is insisted, that by such contract the city had exhausted its power to procure water and light from any other source. It seems to us the statement of the proposition carries with it its own refutation. In this State no city can grant an exclusive right to furnish either water or lights. Brenham vs. Water Company, 67 Texas, 544. The argument comes down to this, that whenever a city has made a contract with a company able and willing to supply it with the necessary water and lights—terminable it may be at the city's option, and burdensome in its terms—its power is exhausted, and any attempt to procure water and light by other means is ultra vires and void. Such an argument cannot be maintained."

Our position is not in conflict with the long list of cases following the Charles River Bridge case, 11 Peters, 548, and of which the following are the latest and most striking examples:

Stein vs. Supply Co., 141 *U. S.*, 67.

Syracuse Water Co. vs. City of Syracuse, 116 *New York*, 167.

Matter of the City of Brooklyn vs. Long Island Water Supply Co., 143 *New York*, 596.

Oregon Ry. & Nav. Co. vs. Oregon Ry. Co., 130 *U. S.*, 1.

We do not claim that the State of Texas in incorporating the City Water Company covenanted with us that no other corporation would be created with similar privileges, or that we thereby gained an exclusive right to supply Austin with water. What we do claim is that the City of Austin had the power:

(1.) Either to build its own works and supply itself with water; or,

(2.) To contract for such a supply with the City Water Company.

It did the latter.

The City of Austin was as much bound by its contract as the water company was. Neither could prevent performance by the other, or so change the *status quo* as to take from the other the gains naturally flowing from performance.

The grant was not for an unreasonable time, nor, in any sense, a perpetuity. Surely twenty (20) years, with the right to buy in ten (10), at a valuation fixed by arbitration, is not unreasonable when a large sum of money, immediately, at least $350,000, was invested in the plant, and the only hope of return was from the sale of water to Austin and its inhabitants.

The City of Austin, therefore, could not build its own water works, because by so doing it prevented performance by the City Water Company, took from it the gains and profits it otherwise would have made, and rendered the contract and the property of the water company practically valueless.

The question is one of contract.

The City of Austin is just as much bound by its contract and its performance, and is just as liable for its breach, as an

individual would be. It is as much bound to good faith as an individual.

If it had the power to make the contract it must, in good faith, carry it out.

To erect new water works for the city of Austin is flagrant bad faith on its part.

The very thing the city of Austin contracted about was, in its nature, exclusive.

It was a *supply* of water.

Having one supply the city had not power to procure another.

If the city, under valid authority, saw fit to contract for the supply it cannot strike down and disregard its own contract.

We differ, and materially differ, from the Charles River Bridge case, and all cases following in its train. We stand upon our contract and our contract rights, and not upon any special grant of exclusive privilege.

Nor are we troubled with the decision in Syracuse Water Co. vs. City of Syracuse, 116 *New York*, 181.

In that case there was no contract, and the exclusive privilege claimed was in perpetuity.

The case of Richmond County Gas Light Co. vs. Middleton, 59 *New York*, 231, was where the Legislature repealed the statute upon which the authority of the municipality depended, and this was held to terminate the contract it had made for gas light.

How far that case can stand under the reasoning in the People of the State of New York vs. O'Brien, 111 *New York*, 1, may be doubtful, but it is a question which we do not have

in this case. Texas never did repeal the act authorizing our contract.

That this case does not fall within the Charles River Bridge case may be shown by the following among other reasons:

(1.) The water works were erected by the City Water Company relying upon the promise of the City of Austin that the company should have the right, for a definite period, to supply Austin with water, and that the City of Austin would pay a yearly rental to the City Water Company for hydrants, to be maintained and supplied with water by the City Water Company.

The gains and profits which the City Water Company was to derive from its contract was from the sale of water to the inhabitants of Austin, and the payment of the hydrant rentals by the City of Austin. The City of Austin, therefore, was an actor under the contract, as was, also, the City Water Company.

In this respect the distinction is marked between our case and that of the Charles River Bridge; that bridge was not erected by virtue of any promise made by the Bridge Company to the State. The State never promised the Bridge Company to pay any portions of the tolls, or make any use of the bridge. The Bridge Company could not point to any promise on the part of the State as to the future gains and profits from the use of the bridge if the Bridge Company erected the structure. If there was any contract relation whatever

between the two it is what might be termed the technical one growing out of the Dartmouth College decision, but this did not bind the State to any action on its part in the future.

(2)—The rule of construction where the question is as between the State and the corporation as to franchises granted is strictly in favor of the State and against the corporation as to the franchises granted by the State to the corporation. There is no intendment or inference in favor of the corporation as against the State.

In this respect the contract between the City Water Company and the city of Austin is governed by another rule, and that is, that the intent and meaning of the parties to the contract is to govern, and that intent is to be ascertained by a fair construction of the words used, giving to each word its usual and ordinary meaning. The rules of law which govern such a contract are exactly the same as those which govern a contract between two individuals. Let A represent the city of Austin and B the City Water Company, and supposing A and B had made the identical contract which the city of Austin made with the City Water Company. Undoubtedly, under the authorities we have cited, A could not destroy the contract, nor prevent its performance by B, nor so act as to render performance more difficult by B, or to take from B the gains and profits which he would naturally receive from carrying out the contract, or change the status of the contract so that B would be prevented from receiving those gains and profits.

Our position is, that if this be true as to a contract between A and B, it is equally true as to the contract between the city of Austin and the City Water Company.

Police Power.

It is not intended to claim that this contract deprived the city of Austin of the police power delegated to it by the State, and that the city, in case of an emergency or a necessity, could procure a water supply elsewhere under the police power may be conceded. What we insist upon is, that the City of Austin cannot do this of its own mere will without any necessity or occasion therefor. So long as the City Water Company is giving it an ample and sufficient supply of water the city of Austin cannot build its own works, and thereby strike down its contract with the City Water Company. This is not an exercise of the police power by the city, because it is not pretended that the building of the new works is necessary to the public health, safety or convenience.

This case is, therefore, free from the difficulty which seems to have troubled so many courts, that a contract, running a number of years, for the supply of water or gas to a city, deprived the city, pending the contract, of the exercise of its police powers, and, therefore, was invalid. The reply is, the contract at bar does not so deprive the city of its police power, but leaves it in full possession of the same, and the city may freely exercise this police power when the necessity arises for it so to do.

The New Orleans Gas Co. vs. The Louisiana Light Co., 115 *U. S.*, 650;

Tiedeman on Municipal Corporations, sec. 144, and cases cited.

This book seems to contain a reference to practically all of the cases on the question, on whichever side of the controversy they may be.

Hydrant Rentals.

The city of Austin, under this contract, agreed to pay the City Water Company $100 a year each for one hundred hydrants, and this money the contract provided should be applied to the payment of the interest on the bonds which were to be sold to carry out, by the City Water Company, its part of the contract,—that is, the extension and completion of the water works. The contract was to run absolutely ten years, with the right of the city to buy at any time thereafter. If the city did not buy the contract was for twenty years, with a provision for renewal.

This portion of the contract, which expressly appropriates the hydrant rentals for the payment of the interest on the bonds, is the one in which the bondholder is particularly and directly interested. The money was a trust fund, of which he, the bondholder, became the *cestui que trustents.* The City Water Company, and, indeed, the city of Austin, in part, became trustees for the payment of and the appropriation of the hydrant rentals to the interest on his bonds.

The city, in this regard, surely made a contract which was valid and binding, even if it could be proven that she could erect her own water works. Even if the new water works were erected by the city she was still bound under this contract to pay the hydrant rentals, and the bondholder was still entitled to have the same appropriated to the payment of the interest on his bonds.

If the city saw fit to erect a new water works, and it had the lawful right so to do, this is no excuse why it should not fulfill its contract with the bondholder and for ten years pay one hundred dollars a year each for one hundred hydrants, and that this money should go to the bondholder on account of the interest and principal of the bonds.

While in the hydrant rental the bondholder is directly interested, it is also true that he is largely interested also in any depreciation of the water plant, which is the security to him, under the mortgage, for the payment of the principal and interest of his bonds.

NEGATIVE VIEW.

The city by its demurrer, admits all allegations of fact but it alleges:

(1.) That the original contract was void under the Constitution and Laws of Texas.

(2.) That the city has, and always had, the right to build its own water works.

(3.) That the city had no right to exempt the water works from taxation, or accept water for public use in payment thereof.

(4.) That even if the contract and charter had in express terms sought to grant to the Water Company the exclusive right to furnish the city and its inhabitants with water, under the Constitution and laws of Texas such grant was revocable.

(5.) That the grant of the new charter to Austin by the Legislature is a revocation of this contract.

(6.) That the plaintiffs have their remedy at law.

The United States Circuit Court sustained the demurrer and dismissed the bill as without equity, but filed no opinion.

I.

The first ground of the defendants' demurrer is that the contract between the city and the water company is *ultra vires* and void.

With the provisions in the general law of the State permitting cities to make contracts with water companies, it cannot be claimed that every such contract is void. The contention must mean that this particular contract is void, either because it is an *exclusive* contract, or because it is made *to run for twenty years.*

The defendants confound two distinct features coutained in this ordinance of the Mayor and City Council:

(1.) The assent of the city that the water company might lay pipes in the streets of the city and to supply water.

(2.) The contract with the water company to take water from it for a period of twenty years, reserving the right to the city to purchase the property of the company at the expiration of ten years.

We will consider these separately.

Even if it be charged that our license was exclusive, it would not necessarily destroy it.

It cannot be denied that a State has the right to grant an exclusive license to a private corporation to lay pipes in the streets of a city for gas or water, unless there be something in the constitution prohibiting it, and in the same way it may delegate to a municipal corporation the power to grant such a license without its becoming obnoxious to the prohibition against creating monopolies.

> "A private corporation, as well as individuals, may be employed by a city in the construction of water works for the health, comfort and convenience of its citizens, and though such works may be used by the corporation for its own gain, yet as they advance the public good the corporation may be properly aided in their construction by the city. Legislation of that character is not liable to the objection that it is a mere monopoly, preventing citizens from engaging in an ordinary pursuit or business open as of common right to all upon terms of equality; for the right to dig up the streets and other public ways, and place therein pipes and mains for the distribution of gas for public and private use, is a franchise, the privilege of exercising which could only be granted by the State or by the municipal government of the city acting under legislative authority.
>
> N. O. Gas Co. vs. Louisiana Gas Co., 115 *U. S.*, p. 659.

The easement to lay pipes and mains through the city of Austin was primarily given by the State of Texas to the City Water Company. The statute (sec. 629) expressly grants it. The words are:

> "And such corporation shall have power to lay pipes' mains and conductors for conducting gas or water through the streets, alleys, lanes and squares in such city, town or village, with the consent of the municipal authorities thereof and under such regulations as they may prescribe."

The city's power over the grant is only to refuse or grant consent and make reasonable regulations. It does not make the grant itself.

It may attach to the consent *conditions*, and may make regulations.

With these powers of the city the statutes give another, i. e., the power to contract with any water corporation for supplying water.

Surely it cannot be successfully claimed that it ever was of common right to the citizen to lay pipes for distributing water through the city, or to require municipal assent to the same, or to contract with the city for a supply of water.

We do not claim that the State of Texas gave us an exclusive license to lay pipes in the streets of Austin, or that it delegated to the city the right to grant such license. Therefore, the ordinance which was passed by the city is not, for this reason, *ultra vires* or void.

We do, however, insist that, as the city was authorized to contract with any water corporation for a supply of water, the *contract* was to be governed by those ordinary and usual rules of law applying to contracts, and among these was the duty of the contracting party to act in good faith, and not to do that which would in effect destroy the contract. If the very nature of the contract was such that the city destroyed its value to the contracting party, and made it impossible for him to carry it out if it built rival works to also supply the city with water, the law of the contract forbade it.

We next consider whether it was bad because it made a contract which might run for twenty years or longer, unless the city saw fit to terminate it in the manner provided in the contract.

The power which the state gave to the city to make a contract, did not limit either the length of time nor the consideration to be paid. Both of these were left to the discretion of the city authorities, and in each instance had to be determined by the circumstances of the particular case.

Here was the case of a city that stood in urgent need of means to supply its inhabitants with water, and to extinguish fires, and which had no money nor credit to enable it to do this. It contracts with the water company in consideration of the expense and risk which the latter incurs, to take the city supply from it for ten years (for at the end of that period the city can terminate the contract), and pay it a price fixed by the city itself. This was surely a reasonable exercise of the power the state had granted. That the *contract* for the water which was to be used by the city for public purposes, including the extinguishment of fires, was an *exclusive contract* for the period named, was only to give it the character which pertains to almost every contract that a city makes. If it contracts for coal to heat the court house and jail and city hall, or lamps to light its streets, or paper and envelopes to enable its business to be contracted—all these are necessarily in their nature exclusive; otherwise the taxpayers' money would be uselessly spent in securing double supplies. The length of time the particular contract is to run depends much on the nature of the thing to be supplied. It may be confidently asserted that it was the only kind of contract that the city could have made at the time, for no company would have undertaken to build works involving so large an expenditure if at the end of a year its most valuable customer could withdraw.

The water company doubtless felt that with a license to use the streets, with one large customer assured to it for ten years, with a contract that during that period it could pay its taxes in water supplied to the city, that after ten years the city would either continue its custom or would buy its works, the enterprise of building these works was a fair business venture. Certainly those who bought the bonds believed it.

Was the contract *ultra vires* and void because it was made for ten years or twenty years, as the city might determine?

> "A city was authorized by its charter to grant water work privileges to private companies, to itself erect water works, or to purchase or condemn water works erected by others. It granted the rights to a corporation, and stipulated that it would not itself erect competing water works for a period of twenty-five years, but this was not to prevent it from purchasing or condemning the plant at any time. Held that the stipulation was valid, and that a breach thereof by the city would impair the obligation of the contract within the meaning of the federal constitution, and that therefore a federal court would have jurisdiction to enjoin the city from constructing water works or issuing bonds therefor."
>
> Walla Walla Water Co., 60 *Fed. Rep.*, 659.

A State statute authorized a town to construct water works and also to contract with third parties for a water supply. The town adopted the latter course, and granted to a corporation a right to construct water works, and to supply the town on certain conditions. After the water company had constructed an adequate plant, and was prepared to comply with its contract in all essentials, the town passed a vote to itself construct a water works plant. Held:

> "That as this action was taken under authority of the State statute, it was in effect an act of the State, which impaired the obligation of the previous contract with the water company, contrary to the Constitution of the United States.
>
> "The final question thus recurs whether the vote of the town of April 11th, 1895, and the subsequent votes and proceedings do impair the obligations of the contract made June 29th, 1885.
>
> "There can be no doubt that the effect of carrying out this vote will be greatly to depreciate the value of the water works, and of the bonds issued by them, and that the town intends to proceed to construct its works and to supply water to the inhabitants regardless of these consequences.

"The Westerly Water Works will remain under the obligation of the contract to supply water without charge to the town hall, and for drinking fountains, to maintain a prescribed head of water, and perhaps sell their works to the town at an appraised value.

"It seems reasonably clear that if there be a contract here, the value of the contract at least will be materially impaired. The respondents urge that to grant relief here prayed, and to enjoin the construction of the water works would be in effect to give to the complainants the benefit of an exclusive franchise, to which benefit they are not entitled. This statement, however, is not entirely correct. If the complainants had an exclusive right, they could enjoin any other works, even if they were unable to supply the persons to be accommodated by the proposed works, and even if there were no immediate ascertainable injury to themselves. This is the result as it seems to me from all of the cases on this question, provided always that the conduct of the owner of the franchise is not such as to forfeit their rights. On the other hand, to refuse relief here would be to permit the destruction of the whole contract. There must be some rights which are entitled to be protected under a contract admitted and found to be valid."

Westerly Water Works Case, 75 *Fed. Rep.*, 81, (1896).

"The granting of the privilege formerly enjoyed by a municipal corporation by legislative enactment to a private corporation for its exclusive use for a term of years, is not unconstitutional; and having been granted is, during the term, a contract beyond the reach of subsequent legislative interference."

City of Memphis vs. Memphis Water Co., 5 *Heiskell*, 495.

"A city of the second class has the power to enter into a contract with private parties or a corporation, for water to be furnished it for fire protection by such parties or corporation; and when a city of the second class has entered into such a contract and a water works plant has been erected and maintained at a great expense for the period of four years or more, and during that time the corporation owning the plant has furnished water in accordance with the contract entered into and recognized by the city, and the city has levied the proper tax and paid

the hydrant rental for three years, and otherwise recognized the validity of such contract, *held*, that this court will not hold the contract void under the facts as stated in the petition, because the city did not possess the power to make a contract for the period of twenty-one years. While the city may be powerless to make a contract for the duration alleged, still the contract should be upheld for a reasonable time, when the circumstances and condition of the city as to population and assessed valuation are substantially the same, and no better facilities are offered upon more reasonable terms."

Columbus Water Co. vs. City of Columbus, 48 *Kans.*, 99.

"It being the duty of the municipal corporation to light the streets, etc., where such corporation has the power by legislative grant to erect and maintain gas works, it follows, that it has the implied power to contract with others to furnish it in like manner, and may, therefore, by contract, grant to a corporation the exclusive right to the use of its streets for a term of years.

"Injunction is the proper remedy to prevent a city which has by contract conferred such a privilege upon another corporation."

City of Newport vs. Newport Gas Co., 84 *Ky.*, 166.
See also, City of Louisville vs. Wible, 84 *Ky.*, 290.

"The legislative grant of an exclusive right to supply gas to a municipality and its inhabitants by means of pipes, etc., and upon condition of the performance of a public service, after the performance by the grantee, is a contract protected by the Constitution of the United States against State legislation to impair it. In granting such a contract the State does not part with its police power."

Louisville Gas Co., 115 *U. S.*, 683.

"Where a city by ordinance grants the right to a party to construct water works at his expense to supply the city and its inhabitants with water, with the right to lay water pipes under the surface of the streets and alleys for a period of years, which grant is accepted and the work partially performed, the privilege of the use of the streets is not a mere license revocable at the pleasure of the City Council, but is a grant under an express contract for

an adequate consideration, and is binding as a contract. When there is power in a city to make a contract, there is power to make one that will bind the parties."

City of Quincy vs. Buel, 106 *Ill.*, 337.

"A city of the second class under the laws of the State of Kansas has power to contract with a private party for the construction and operation of water works, to agree to pay rent for the use of hydrants, and to grant such a party the use of its streets for the purpose of laying pipes to conduct the water.

"Such a city has no power to grant to a private party the exclusive right to use its streets for that purpose.

"When a divisible part of a contract is *ultra vires*, but that part is neither *malum in se* nor *malum prohibitum*, the remainder of the contract may be enforced, unless it appears from a consideration of the entire agreement that it would not have been made independently of the part which is void.

"The invalidity of the exclusive grant by a city of the right to use its streets to conduct water to its inhabitants is no defense to an action for the rents the city promised to pay to the grantee for the use of the hydrants after the works have been constructed according to the contract and have been acepted by the city.

"The members of the legislative body of a city may not so act or contract as to deprive their successors of the unimpaired exercise of the legislative or governmental power conferred upon the body for the purpose of ruling the inhabitants of the city, but this rule is inapplicable to the exercise of the business or proprietary powers of the municipality, such as the power to contract for water works, because such powers are conferred upon the legislative body of a city for the private benefit of its inhabitants and itself as a personalty, rather than to enable it to govern its citizens.

"In the exercise of these business powers a municipality is governed by the same rules as a private corporation or an individual, and it may make contracts for terms longer than the duration of the terms of office of the members of its legislative body.

"*Held*, further: The legislature intrusted the determination of the length of the term of such a contract to the discretion of the City Council, and in the absence of evidence of a gross abuse of that discretion it is not the

province of a court to declare such a contract void because its term was twenty-one years."

Illinois Trust and Savings Bank vs. City of Arkansas, U. S. Court of Appeals, Eighth Circuit. 76 *Fed. Rep.*, 271, (1896).

II.

The second ground of demurrer is that the city has and always had the right to build its own water works.

We admit that it had this right, and have cited authorities to establish it, and also the authority to show its right to contract with the water company for the same service, but we contend that after it had induced the water company to make these large expenditures, upon the faith of the city's promise, and had made a contract which is now executed, it had no right to build opposition works and support the same at the public expense, thus compelling the water company to contribute the means for its own destruction, and render it possible for the city to buy the works, as it has the right to do, at a valuation which has thus been reduced, if not destroyed.

This question has been very thoroughly examined in the late case of White vs. the City of Meadville, decided by the Supreme Court of Pennsylvania, on October 5th, 1896.

"The borough of Meadville had under an Act of the Assembly 'at all times the unrestricted right to make and erect and maintain all proper water works, etc., or to make contracts and authorize any person, company or association to erect the proper water works, machinery,

etc., and give such person, company or association exclusive privilege to furnish water as aforesaid for any length of time not to exceed ten years. A subsequent section authorized the purchase by the city, at such price as may be agreed upon, of the rights, privileges and franchises of any water company, and to condemn the land and property for the construction of water works.' Here there plainly were two distinct methods by which the municipality could supply the citizens with water. There is no repugnance in the provisions of the two Acts. There will be decided repugnancy in their operation if both be put to work at the same time to effect that purpose. No community will pay double for any article of necessity or luxury. If the property holder must, by compulsory taxation, support the municipal system, he will not voluntarily support a private corporation system. Such a conflict of interest will inevitably bankrupt a company which depends upon the voluntary patronage of the public. We hesitate to assume—every court is bound to hesitate before assuming—that the legislature intended by grants to distinct corporations for public purposes that there shall arise such conflict in the exercise of the franchises as will result in practical destruction of the property of any citizen without compensation."

White vs. Meadville, 35 *Atlantic Rep.*, p. 695.

"We have decided in White vs. Meadville, on the construction of the Act of Assembly, the legislature never intended to commit the duty of supplying water to a municipality to two different agencies, both in operation at the same time. The borough had authority to provide a supply of water for the use of the inhabitants. This supply was provided by the Union Water Company, subject to such regulations in regard to streets, roads and grades as the borough imposed. The borough did not attempt to construct the water works until years after the water company had laid its mains and the public had been served. The rights of the water company vested by consent of the municipality and its contract to supply water for public purposes. The rights of the company are fixed by the Act of 29th April, 1874, under which it came into existence, and so are its obligations. If, as alleged, it fails to furnish a sufficient amount of pure water the courts are open to any complainant. After twenty years the borough had the power to purchase the works at price not exorbitant. We concur with the court be-

low in its findings of facts, but not in its conclusions of law as already noticed; therefore, the decree is reversed, and it is directed that an injunction issue restraining the borough of Beaver Falls and its officers from creating the proposed indebtedness of $123,000 for the construction of water works, or any part thereof. Further, that said defendants be enjoined from executing any contract for the construction of the proposed water works. Further, that the said borough and its officers be restrained from passing any ordinance, or doing any other act, matter or thing in furtherance of its purpose to increase its indebtedness to erect said water works."

Martin Metzgar vs. Borough of Beaver Falls, Supreme Court of Pennsylvania, January, 1897. (*Not yet reported.*)

III.

The third point in the demurrer is, that the city had no power to exempt the property from taxation.

This ordinance and contract does not undertake to grant an exemption from taxation as a gratuity or subsidy, but, as far as it appears from the facts stated, a full equivalent is given for the taxes in the supply of water to the public buildings, fountains, drinking places and twenty-five hydrants, for all of which the water is furnished without charge.

"Where an ordinance provided that in consideration of certain covenants by a water company to supply the city with water, its franchises and all property actually required for the management of its water works shall be exempt from taxation (municipal.) Such provision was not to exempt from taxation, but was in effect a payment of the taxes by the parties to the covenant on the part of the water company."

Grant vs. Davenport, 46 *Iowa*, 396.

> "It is within the constitutional authority of the Legislature to empower a city to exempt from taxation for a term of years property belonging to a water company, in consideration of the undertaking and agreement by the company to furnish free of cost to the city a supply of water for its public and municipal purposes."
>
> Portland vs. Water Company, 67 *Me.*, 135.

See also—

Jefferson Branch Bank vs. Skelly, 1 *Black*, 436.

New Jersey vs. Wilson, 7 *Cranch*, 164.

IV.

The fourth ground of demurrer is that this was an exclusive grant to the water company, and under the terms of the Constitution all such grants are revocable.

The words of the Constitution of Texas are, Section 17 of the Bill of Rights:

> "And no irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the Legislature, or granted under its authority, shall be subject to the control thereof."

As we have seen, the Legislature granted to the City Water Company, a corporation of the State, a franchise creating it a corporation, and to it gave the right to use the streets of Austin for distributing water.

The Legislature granted to the city the power of assent or dissent, and also of regulation, and expressly gave it the right to provide the city with a water supply by erecting its own works or contracting for a supply with a water company.

If this delegation of powers to contract for a supply is good, it evidently gave the city such power and discretion as was reasonably necessary under all the exigencies of the matter contracted about, and this necessarily included the time for which, under the circumstances, the contract should be made, as well as the price of the water, and all these varied with whatever might be the surrounding circumstances.

If new water works were to be built to provide a supply, no one would build without a contract running such a length of time as would insure a reasonable return.

Such a contract, reasonable and fair in its terms, is not the grant of irrevocable or uncontrollable special privileges.

We have already stated that we do not contend that the *grant* was exclusive, except in the qualified manner hereinbefore stated, but this *contract*, fully executed as it has been by the water company, the Constitution of the United States protects from violation.

> "The power of the State, through her laws, etc., to protect the public cannot be relinquished, yet the State and its municipalities may make such contracts as will attain this end, and while the power must remain in the city or State to modify or release such contracts if they do not accomplish such purpose, neither the city nor State can be allowed to disregard or recall its contract upon mere caprice or to gain a pecuniary advantage."
>
> City of Louisville vs. Wible, 84 *Ky.*, 270.

> "Where the City Council was allowed discretion as to the method of supplying water, they exhausted their authority in making the contract with a water company, and the court protected it."
>
> Atlantic City Water Works, 39 *N. J. Eq.*, 367.

> "Where a contract is entered into in good faith between a corporation, public or private, and an individual person, and the contract is void in whole or in part, because of a want of power on the part of the cor-

poration to make it, or to enter into it in the manner in which the corporation enters into it, but the contract is not immoral, inequitable or unjust, and the contract is performed in whole or in part, by and on the part of the parties, and the other parties receive benefits by reason of such performance, over and above any equivalent rendered in return; and these benefits are such as one party may lawfully render and the other party lawfully receive, the party receiving such benefits will be required to do equity toward the other party, by either rescinding the contract and placing the other party in *statu quo*, or by accounting to the other party for all benefits received for which no equivalent has been rendered in return, and all this should be done as nearly in accordance with the term of the contract as law and equity will permit."

Brown vs. City of Atchison, 17 *Pac. Rep.*, 465.

"The doctrine of *ultra vires* will be applied to the contracts of corporations only when such contracts remain wholly executory."

Thompson vs. Lambert, 44 *Iowa*, 239.

See also ante-pages of this brief.

V.

The fifth ground of defendants' demurrer is that the power of revocation contained in the Constitution was directly exercised by the grant of the Legislature of a new charter to the City of Austin.

If we are right in the position we have taken in answer to the last (IV) point, neither by the Constitution of the State, nor by the charter granted to the City, could this contract be violated.

The new charter to the City of Austin was not a revocation of any legislative power by virtue of which our contract was made.

VI.

The defendants say that the bondholders have a remedy at law.

The statement of our case alone is sufficient to answer this objection. The City has only undertaken, so far as the bondholders are concerned, to pay the water rental for interest on the bonds. Who is to pay for the value of our security thus destroyed? How can this value be estimated? No private purchaser could be found for these works, for who would purchase water works in a city where the city itself is a competitor for custom? In the language of the Meadville case already cited:

> "If the property holder must by compulsory taxation support the municipal system, he will not voluntarily support the private corporation system."

What is the value of these works which by the terms of the license the city has the right at any time to take possession of? The appraised value to-day is the price at which the city has a right to buy them. But if any other purchaser could be found, would he be willing to take these works with the full knowledge that the whole power of the city could be used to depreciate their value, and that at any time hereafter the city would have the right to take them from him at this depreciated value?

MOTION TO DISMISS APPEAL.

We submit that the motion to dismiss the appeal should be denied as being clearly without merit.

Paragraph 30 of the bill (Record pp. 21–2) distinctly alleges:

> "That the said ordinances were passed and adopted by the said city council of the said city of Austin, and approved by the said mayor of the city of Austin in violation of the provisions and inhibitions contained in section 10 of article 1 of the constitution of the United States;"

and paragraph 33 (Record pp. 23–4), with equal distinctness, alleges:

> "That the purpose, intent and effect of the said act of the legislature of the State of Texas was to impair the binding force and obligation of the said contracts * * * and that the said legislation was unlawful and in violation of the provisions and inhibitions contained in section 10 of article 1 of the constitution of the United States."

As the city ordinances were passed under supposed legislative authority, the jurisdiction of the federal court attaches exactly as in the case of a direct act of the legislature.

> Saginaw Gas Light Co. vs. City of Saginaw, 28 *Fed. Rep.*, 529.
>
> Weston vs. City of Charleston, 2 *Peters*, 462.
>
> Wright vs. Nagle, 101 *U. S.*, 791, 79
>
> Wo Lee vs. Hopkins, 118 *U. S.*, 356, 359.
>
> Hamilton Gas Light Company vs. Hamilton City, 146 *U. S.*, 258, 266.

Under section 5 of the Act of March 3, 1891, appeals or writs of error may be taken from the district or circuit courts direct to the Supreme Court, among other instances,

> "In any case that involves the construction or application of the Constitution of the United States," and also "In any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States."

The paragraphs of the bill which we have above quoted show that this case comes directly within the terms of the Act authorizing appeals or writs of error to be taken to the Supreme Court.

In a case in which a federal law was claimed to be unconstitutional, this Court declared:

> "In order to bring a case within this clause of the Act, the Circuit Court must have construed the Constitution or applied it to the case, or must, at least, have been requested and have declined or omitted to construe or apply it."
>
> Cornell vs. Green, 163 *U. S.*, 75, 78.

Here we have a clear request to the Court to apply the constitutional provision against the impairment of contracts, and a distinct omission by the Court to make such application.

See decision of the Court of Appeals for the first circuit, in case of town of Westerly vs. Westerly Water Works. 76 *Federal Reptr.*, 467.

II.

The constitutional question gives to this Court jurisdiction, not of that question only, but of the entire case and of every question involved in it.

In Horner vs. United States, 143 *U. S.*, 570, 576, the law is thus laid down:

> "Where an appeal or writ of error is taken direct to this Court under section 5 of the Act of March 3, 1891, in a case in which the constitutionality of a law of the United States is drawn in question, this

Court acquires jurisdiction of the entire case and of all questions involved in it, and not merely of the question of the constitutionality of the law of the United States. This is shown by the fact that under section 5 when an appeal or writ of error is taken direct to this Court in a case in which the jurisdiction of the District Court or of the Circuit Court is in issue, it is specifically directed that 'the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision;' but there is no kindred limitation prescribed in regard to any of the other cases in which jurisdiction in this court of appeals or writs of error is given by section 5."

See also, to the same effect—

Chappel vs. United States, 160 *U. S.*, 509.
United States vs. Jahn, 155 *U. S.*, 112, 113.

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> When, by the contract of 1882, between the City of Austin and the City Water Company, the City provided an ample supply of water for its territory and people it exhausted its power in that respect, and could not, during the pendency of that supply, build its own water works.

We neglected to call the attention of the Court, as we should have done in our brief to an Act of the State of Texas, passed in 1875, which was in force when the water contract was made, and is still in force. See Revised Statutes of Texas for 1879, page 67, Article 374; also, the General Laws of Texas for 1875, page 126, Section 31.

That Statute was passed as a part of the delegation of power by the State to the Councils of the cities and towns of Texas, and, among other powers, it gave them as follows:

> "To provide, *or cause* to be provided, the City with water, to make, regulate and establish public wells, pumps and cisterns, hydrants and reservoirs in the streets, or elsewhere, within said City, or beyond the limits thereof, for the extinguishment of fires and the convenience of the inhabitants, and to prevent the unnecessary waste of water."

This Statute, read in connection with certain provisions of an Act of Texas, incorporating the City of Austin, approved April 5, 1873, and cited in the third paragraph of the Bill, seems clearly enough to give to the City of Austin the general power to provide a water supply for its people and property. How that water was to be supplied was, in the first place, left discretionary with the City.

It might, itself, directly provide it by the construction of water works, or it might, *indirectly* provide it by some other means, and one of the means distinctly designated by statute, and cited in the fifth paragraph of the Bill, was by contract with a corporation organized under State laws for that purpose.

The thing the City was authorized to do was to procure a water supply.

The *means* of procuring it, either by direct action of the City

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in constructing water works, OR by contracting with some other water corporation to furnish such supply, was left to the discretion of the City.

The power, however, was in the alternative. The City could either build the works itself, *or* could contract with some other water corporation to furnish the supply. The City could not, at one and the same time, *both* build the works *and* make a contract for the supply.

It was but *one* supply the City was authorized to procure. Only *one* supply would be beneficial or useful to the City. The authority given did not extend to *two* supplies, one of which would be unnecessary and useless.

When the City procured the one supply it exhausted its powers pending that supply, and during the time the supply was ample. Whichever mode the City elected to take to procure the supply necessarily prevented the procuration, by the City, of a double supply by some other mode, for it would be a useless waste of the money of the citizens to so do.

As it is admitted under the pleadings that the City of Austin did procure an ample supply of good water by its contract with the City Water Company, it could not, pending that contract and during the sufficiency of the supply, erect its own water works. In making the contract with the City Water Company it elected as to the mode in which it would secure the supply, and, having so elected, it prevented it, during the continuance of the contract, from erecting new works for another supply.

The City did not, by this contract, exclude itself from the future exercise of its police powers in case of necessity; and, in addition, the contract provided ample means by which the City could procure the water works at fair and reasonable terms.

The above views are directly supported by the decision of the Supreme Court of the States of Pennsylvania and New Jersey, and by the Circuit Court of the United States for the District of Washington and Illinois.

White vs. the City of Meadville, 177 *Pa. St.*, 643.
Metzgar vs. the Boro. of Beaver Falls, 178 *Pa.*, 1.

Atlantic City Water Works vs. Atlantic City, 39 *New Jersey Equity*, 367.

Atlantic City Water Company vs. Atlantic City, 48 *New Jersey*, 378.

Columbus Water Company vs. the City of Columbus, 48 *Kansas*, 99.

Walla Walla Water Company vs. the City of Walla Walla, 60 *Federal Reporter*, 659.

Illinois Trust and Savings Bank vs. the City of Arkansas, 76 *Federal Reporter*, 271.

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